

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF LARRY JOSEPH BRADY.

LESTER BRADY, Personal Representative of the
ESTATE OF LARRY JOSEPH BRADY,

UNPUBLISHED
September 20, 2005

Petitioner-Appellant,

v

MARGARET M. BRADY,

No. 255362
Livingston Probate Court
LC No. 02-005781-DE

Respondent-Appellee.

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Petitioner, as personal representative of decedent Larry Brady's estate, appeals as of right from the probate court's order denying petitioner's motion for relief from embezzlement, conversion and withholding of assets against respondent. We affirm.

I. Facts and Procedural Background

An evidentiary hearing on petitioner's motion was held to resolve the factual issue of whether respondent Margaret Brady was still the named beneficiary of a Certificate of Deposit (CD) after decedent had renegotiated the CD, but respondent's name was not on the new CD as a beneficiary. On January 8, 2002, decedent went to the Ann Arbor branch of Flagstar Bank and executed a 90-day "pay on death" CD for \$75,000.00, naming respondent Brady as the "pay on death" beneficiary. This original CD was admitted into evidence upon stipulation of the parties. The original copy of the CD given to decedent did not have a place for decedent's signature because the bank's procedure was to have decedent execute a separate, original and signed "Certificate of deposit signature card" for its own records. Respondent's name was contained on the original signature card as the pay on death beneficiary.

On April 11, 2002, three days after the CD had matured, decedent went to the Howell branch of Flagstar Bank and "renegotiated" his original CD. However, when decedent received his copy of the renegotiated CD dated April 11, 2002, it did not contain respondent's name as a pay on death beneficiary. However, the signature card for the renegotiated CD did contain respondent's name as a pay on death beneficiary. Thus, there was an apparent discrepancy

between the April 11, 2002 CD not containing respondent's name as a beneficiary and the signature card containing respondent's name. This was the central factual and legal dispute before the probate court.

On May 28, 2002, decedent Brady died testate. On February 18, 2003, petitioner filed a motion alleging that respondent had "wrongfully converted decedent's property" in violation of MCL 700.1205(4)¹ by withdrawing on a CD when she was not a listed beneficiary.

In denying petitioner's motion and ruling in respondent's favor, the probate court ruled that the April 11, 2002 CD was not a separate and new CD, but was merely a renegotiation and renewal of the original CD. Therefore, despite the fact that respondent's name was left off the April 11, 2002 CD, she was still a pay on death beneficiary under the terms of the original CD.

II. Analysis

Petitioner first argues that exhibit 3, which is the signature card containing respondent's name typed in the box designated "pay on death" beneficiary, was not relevant because it does not demonstrate whether decedent did or did not change his mind about respondent being a beneficiary. Petitioner insists that without testimony about why or who typed in respondent's name, it is impossible to discern whether it was decedent's intent to have respondent's name removed, or whether a simple clerical error was made in leaving her name off the actual April 11, 2002 CD. Thus, petitioner argues exhibit 3 is irrelevant because it does not make any fact of consequence more or less probable. We disagree.

The decision whether to admit evidence is within the discretion of the probate court and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the probate court acted, would say that there was no justification or excuse for the ruling made, *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

¹ MCL 700.1205(4) states in pertinent part:

If a person embezzles or wrongfully converts a decedent's property before letters of authority are granted, or refuses, without colorable claim of right, to transfer possession of the decedent's property to the personal representative upon demand, that person is liable in an action brought by the personal representative for the benefit of the estate for double the value of the property embezzled, converted, or withheld.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Wayne Co v State Tax Comm'n*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

In this case, considering the foundation testimony regarding Flagstar's procedures for renegotiating CDs, we find that exhibit 3 was relevant because it made it more probable than not that a mistake was made regarding the renegotiated April 11, 2002 CD and that respondent was still a beneficiary of the CD.

Before respondent moved for the introduction of exhibit 3, the regional operations manager for Flagstar bank, Glen Ross, explained that the "renegotiation" of a CD is not a new CD, but only an update of rate and amount information on the CD. Ross further explained that when decedent came to the bank after the term of his CD had expired on April 8, 2002, the April 11, 2002 signature card was insignificant because the original signature card stays in effect. Ross went on to explain that the likely reason for the missing signature on the April 11, 2002 CD issued to decedent is that someone forgot to include this when it reissued the CD to decedent. Ross also explained that the April 11, 2002 signature card likely contained respondent's name because it was typed-in by a customer service representative who noticed and corrected the clerical error.

Thus, the signature card containing respondent's name was relevant to support Ross' testimony and respondent's factual contention that because the CD was only renegotiated, i.e., was updated, the omission of respondent's name from the signature card was only a clerical error. Additionally, exhibit 3 is relevant considering Ross' testimony that the account number on both the January 8 and April 11 CD issued to decedent were the same. Thus, as Ross testified, decedent could only have removed respondent's name as a beneficiary from the CD if he had closed that account and opened a new and separate CD account. Exhibit 3 was relevant to support this factual point.

Next, petitioner argues that the probate court committed error by determining that exhibits 3 and 4 qualified as business records under MRE 803(6). Specifically, petitioner argues that the probate court admitted the exhibits without first determining the trustworthiness of the documents.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. In this case, exhibits 3 and 4 qualified as hearsay because they are documents offered to prove the truth of the matter asserted in them: that respondent Margaret Brady was the "pay on death" beneficiary. This Court articulated the evidentiary foundation required to admit business records pursuant to MRE 803(6) in *People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984):

For a proper foundation to be established for the admission of this document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was

the regular practice of such business activity to make that record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

In this case, Ross testified that exhibits 3 and 4 were internal documents used for verifying the fact that a CD had been issued to someone. Ross testified that his knowledge of signature cards and Flagstar Bank's internal procedures were part of his job requirements as a regional manager at the bank. Clearly then, Ross established that he was a qualified witness to demonstrate that the signature card was a document, "kept in the course of a regularly conducted business activity" and that "it was the regular practice of such business activity to make the . . . record." MRE 803(6). The issue becomes whether, as defendant argues, the documents meet the trustworthiness requirement for MRE 803(6).

As explained by our Supreme Court in *Solomon v Shuell*, 435 Mich 104, 120; 457 NW2d 669 (1990), "the traditional business records hearsay exception is justified on grounds of trustworthiness: unintentional mistakes made in the preparation of a record would very likely be detected and corrected." While this exception has evolved and been expanded from its "traditional" roots, "trustworthiness, under the current Rules of Evidence, no longer serves as a mere philosophical justification for the admission of evidence otherwise excluded as hearsay. Rather, under MRE 803(6) and FRE 803(6), trustworthiness is itself an express threshold condition of admissibility." *Solomon, supra* at 122-123. Thus, "the trial court, in its discretion, may exclude evidence meeting the literal requirements of the business records exception where the underlying circumstances indicate a lack of trustworthiness business records are presumed to have." *Id.* at 122. However, only where the source of information or the person preparing the report has a motivation to misrepresent, is trustworthiness not presumed. *Id.* at 120.

As the trial court expressly found, the entity preparing the reports, Flagstar Bank, clearly had no motivation to misrepresent the propriety of exhibits 3 and 4. Flagstar Bank has no pecuniary or equitable interest in this case. Therefore, the evidence retained its presumption of trustworthiness, and petitioner's argument that the probate court should have made a deeper inquiry into the trustworthiness of the exhibits is without merit.

Petitioner next claims that the probate court erred in determining that no new CD account was created by the issuance of the April 11, 2002 CD, and that the probate court erred in using parol evidence (Ross' testimony about the renegotiation process) to make this determination. We disagree.

The primary goal of contract interpretation is to honor the parties' intent. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003), citing *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). When the contract is unambiguous, the parties' intent is gleaned from the actual language used. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004), citing *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). When the words used by the parties "are clear and unambiguous and have a definite meaning," the "court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947).

Consistent with these principles of contract interpretation, the parole evidence rule provides that, "parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM, supra* at 492. However, parol evidence that does not vary or contradict the unambiguous terms of a written agreement is admissible. *Wheelmakers, Inc v City of Flint*, 47 Mich App 434, 439; 209 NW2d 444 (1973).

In this case, the January 8, 2002 CD is stamped "Renegotiated" and contains the date of April 11, 2002 as the date of renegotiation. Contrary to petitioner's assertions, Ross' testimony concerning the renegotiation process is not parol evidence with regard to this CD because it does not contradict or alter the language of the CD. Ross merely explains that a renegotiation is "adjusting the term information and interest rate" of the original CD account—not the issuance of a new CD account. Nothing in Ross' testimony seeks to address the meaning of unambiguous terms or contradicts contract language. The testimony might contradict petitioner's argument that a new CD was issued when the April 11, 2002 CD was renewed, but that does not make it parol evidence.

Finally, petitioner's argument that there was no credible evidence that April 11, 2002 CD was *not* a new contract is without merit. As previously discussed, both CDs contain identical account numbers and the January 8, 2002 CD is designated "renegotiated" in the up left corner. As explained by Ross, the April 11 CD was not a separate document or contract. It was merely an update of the interest rate term and the amount of money currently set forth on the CD. As Ross testified, under bank procedures, the only way a new CD contract and/or a change in beneficiary can be accomplished is if a new CD agreement is entered and designated as such with a new account number.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette